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SUPREME COURT OF THE UNITED STATES

October Term 1962

NO. 310

CHARLES H. CARNAL ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

Petitioner, Charles H. Carnal, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Arkansas affirming the conviction and sentence of petitioner for the felony of knowingly receiving stolen property.

OPINION BELOW

The opinion of the Arkansas Supreme Court is reported in 234 Ark. 1050 and is printed in Appendix A hereto infra, p. 10.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on April 23, 1962. The petition for rehearing thereon was filed May 9, 1962, and was denied by the Supreme Court of Arkansas on May 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Was petitioner denied due process of law under the Fourteenth Amendment to the United States Constitution in affirming a conviction without any evidence to support it?

2. Was petitioner denied due process of law under the Fourteenth Amendment to the United States Constitution by the Supreme Court of Arkansas in affirming petitioner's conviction of a felony where there was no evidence in the record of this case that the dollar value of the chattels involved was sufficient to constitute a felony?

STATUTE INVOLVED

The statutory provision involved in Act 48 of the General Assembly of Arkansas for 1959, annotated as Arkansas Revised Statutes Sec. 41-3938. This statute is printed in Appendix B hereof, infra, p. 18.

STATEMENT

Green Valley Cattle Co. leased 12,000 acres of land on the federal reservation comprising part of Fort Chaffee, Arkansas, for cattle grazing. (R. 13) Around the first of April 1961, Cattle Co. employees noticed some cattle were gone. (R. 20) On May 1, 1961, a squirrel hunter found a steer hide some miles away from the federal reservation that bore the Green Valley brand. (R. 17) No witness for Green Valley knew what happened to the carcass. (R. 28)

Later three young men, all of whom possessed criminal records, were arrested. Without trial, all three pleaded guilty to having shot and skinned several head of cattle from Fort Chaffee. These confessed rustlers testified that a small calf carcass was sold to the petitioner for the total sum of twenty-five dollars. (R. 30-77).

Petitioner operated a cafe in the City of Fort Smith, Arkansas, and had been in the business since about 1936. (R. 110) The chief waitress and bookkeeper for petitioner had been contacted around the early part of April, 1961, by one of the confessed rustlers who told her he would have dressed beef to sell at $25.00 a head. (R. 104) In the evening of April 22, 1961, the confessed rustlers contacted petitioner and stated they had a beef. Without inspecting the meat, petitioner called and found a public meat market open. Petitioner directed the rustlers to deliver the meat to the public market and told the market butcher to put the meat in a cooler overnight and also how

to butcher the meat. (R. 106-109) Petitioner's bookkeeper paid the rustlers $25.00 and made a normal entry on his books of the transaction. (R. 125)

The meat market butcher weighed the beef carcass but did not recall the weight. (R. 85) The meat was processed and wrapped. (R. 89)

The meat market operator did not inspect the beef (R. 96), but he did look at the meat to determine that it was light and of low grade (R. 98) (R. 101). This witness also testified that during the month of April, 1961, he had paid a wholesale price of thirty-two cents for high grade beef. (R. 98) That his market charged eight cents a pound for processing beef and one of the tickets to petitioner was for twelve dollars and forty cents. (R. 100)

Petitioner was proceeded against by information that "defendant did unlawfully and feloniously and knowingly have in his possession 155 pounds, more or less, of beef of more than $35.00 in value, knowing same to have been stolen and possess same with the intent to deprive the true owner thereof against the peace and dignity of the State of Arkansas." (R. 2)

Petitioner was tried by a jury in the Circuit Court of Sebastian County, Arkansas, on October 17, 1961. A verdict of guilty was returned in which the jury left the sentence to be fixed by the Court. (R. 3) Judgment of the trial court was five years at hard labor in the State Penitentiary. (R. 5)

The opinion of the Arkansas Supreme Court printed in Appendix A infra, p. 10, recites that petitioner's trial counsel failed to object to any offer of evidence or actions of the Court, and did not object to or offer any instructions. The trial court did not instruct the jury concerning the lesser degree of the charged offense (R. 151), but in instruction No. VI informed the jury only on the felony part of the offense.

Petitioner replaced his trial counsel with others in the appeal to the Arkansas Supreme Court. The Arkansas Supreme Court affirmed the trial court.

The Arkansas Supreme Court in affirming the conviction relied in the main that the trial court was justified in ignoring the complete statute under which indictment was had because the defendant-petitioner sat silent. The court relied on Lackey v. State, 67 Ark. 416.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Arkansas Court in the instant case and in *Lackey v. State*, 67 Ark. 416, which was the touchstone are in direct conflict with the decisions of the United States Supreme Court in *Thompson v. City of Louisville, Ky.*, 362 U.S. 199. Both of the Arkansas Courts in this case rested upon technicalities of convenience and permitted the gross inaction of trial counsel to strip a citizen of five year's freedom without evidence of guilt. This case cries out for careful review. The Arkansas Court tacitly recognized this in its opinion (Appendix A, infra p. 10) in noting the trial defense made no objections to any action of the trial court and offered no objections or exceptions to instructions and requested no instructions.

There is no fair or substantial basis for any conviction here, *Demorest v. City Bank Farmers' Trust Co.*, 321 U.S. 76, and where due process is denied, the Supreme Court may make an independent examination of the facts, *Craig v. Harney*, 331 U.S. 367, even after the sentence of punishment has been announced. *Williams v. New York*, 337 U. S. 241, rehearing denied, 337 U.S. 961. We are not requesting review by writ of certiorari merely for a rehash of facts, the Court has held where facts are conceded, whether they amount to a violation of the statutes would be a legal question and not a fact question. *U.S. ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103.

Within the confines of the record of this case, there is no testimony that petitioner knew the beef to be stolen. There was no evidence in the record of this case that the beef in question exceeded the aggregate value of $35.

The statute under which petitioner was charged (Appendix B, infra, p. 18) holds two edges. The stat-

ute provides a felony penalty upon conviction of one to twenty years imprisonment if the aggregate value of the thing stolen exceeds $35.00. It also provides a misdemeanor penalty of not more than one year and a fine of from $10.00 to $300.00 if the aggregate value of the thing stolen is not more than $35.00. The trial judge in giving instructions to the jury gave the felony part of the statute and conspicuously omitted to give the last half of the statute providing the misdemeanor definition and penalty.

A casual reading of the record as to proof of value of the beef in issue viewed in the light most favorable to the State; as in *Eddington v. State*, 225 Ark. 929, yields a processing cost of 8c per pound, which when subtracted from the highest possible price in evidence on value for first grade beef, i.e. 32c per lb., leaves a balence of 24c per lb. on a maximum of 155 lbs. weight or a total of $37.20 as the aggregate value of the beef. Any entity, judicial or lay, would not figure waste as value and would take away those pounds representing unusable bone, fat and scraps. Proof of aggregate value of the beef in excess of $35.00, even if knowledge of its stolen character is assumed, is not present. The proof is undisputed that the beef in question was dirty, light, and of a very low grade. The verdict and judgment of a court rendered in a criminal case must conform strictly to the statute and any variation from its provisions, either as to the character or the extent of the punishment inflicted renders the judgment absolutely void. *Weems v. U.S.* 217 U.S. 349; *Re Graham*, 138 U.S. 461. A verdict must be based upon evidence —*Erwin v. Dowd*, 81 S. Ct. 1639.

2. As the Arkansas Court noted in its opinion, the defense at trial did nothing to preserve the petitioner's federal rights, either positively or negatively. The petitioner's constitutional guarantees were not raised but remained undisclosed along with the absence of objections to any of the trial court's actions and lack of any requested instructions. Upon reading the trial record we are as surprised as counsel on the first appeal that the two tribunals through which this case has passed did not on their own motion provide protection of the fundamental federal rights for petitioner. Failing in this, counsel on appeal in the petition for rehearing raised the federal question, that petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution. As a realistic matter the federal question was raised by petitioner's counsel at the first opportunity, upon appeal, through petition for rehearing.

It would be irrelevant to inquire how and when a federal question was raised in lower courts when it appears that such question was actually considered and decided. *Manhattan Life Insurance Co. v. Cohen*, 234 U.S. 123; *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 289 U.S. 358. If the state court could not have reached the result without having considered the federal question it becomes immaterial to consider how it was raised. *Cessna v. Tennessee*, 246 U.S. 289.

No formal order was issued in denying the petition for rehearing. However, this appears to be an increasingly wide spread practice of state courts of final jurisdiction, and should not be permitted to destroy the proper existence of a federal question. Quite naturally, the Supreme Court of Arkansas, of necessity, had to consider

the federal question raised by the petition for rehearing in order to deny it. We must assume that no court would disregard the United States constitutional provisions.

We submit that a federal question existed, was raised and considered.

3. Any situation involving a denial of due process of law is by its very nature of urgent importance in the United States. *Malinski v. New York*, 324 U.S. 401; *Rochin v. California*, 342 U.S. 165. This is particularly true and extends to deference towards each citizen where lower courts fail to adhere to the standards of fairness traditionally concommitant with English justice.

The questions here raised are plainly in the interest of the public at large and to courts of justice across the nation.

CONCLUSION

For the foregoing reasons inasmuch as there exists no proof that the petitioner committed any crime or that a crime was committed, and in the worst possible light, the act could not be more than a misdemeanor; the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF ARKANSAS

No. 5038

CHARLES H. CARNAL *Appellant* v. STATE OF ARKANSAS *Appellee*	Opinion Delivered April 23, 1962 Appeal from Sebastian Circuit Court, Fort Smith District AFFIRMED

ED F. MCFADDIN, *Associate Justice*

The information on which the appellant was tried and convicted charged that the appellant "on the 22 day of April, 1961, did unlawfully and feloniously and knowingly have in his possession 155 pounds, more or less, of beef of more than $35.00 in value, knowing same to have been stolen, and possess same with the intent to deprive the true owner thereof against the peace and dignity of the State of Arkansas."[1] Appellant's motion for new trial contains six assignments.

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[1]The information referred to Act No. 48 of 1959 (now found in Sec. 41-3938 Ark. Stats.), which reads: "Any person who shall possess stolen goods, money or chattels which exceed the aggregate value of thirty-five dollars ($35.00), knowing them to be stolen, with intent to deprive the true owner thereof, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one (1) year nor more than twenty one (21) years; and if the aggregate value thereof be not more than thirty five ($35.00) dollars, such person shall be guilty of a misdemeanor and shall be punished by imprisonment in the county prison or municipal or city jail not more than one (1) year and shall be fined not less than ten dollars ($10.00) nor more than three hundred dollars ($300.00)."

I. *Sufficiency Of The Evidence.* Assignments 1 to 4, inclusive, present this issue. Stites, Spence, and Odom testified that they did steal and kill two head of cattle;* that they dressed one and delivered it to Carnal and received from him $25.00 in payment. It was shown by overwhelming and undisputed evidence that Carnal received and had in his possession this stolen beef. His defense was that he did not know that the beef was stolen. Carnal operates the Square Deal Cafe in Fort Smith. In regard to his dealings with Carnal, Stites testified:

> "A. I told him I could furnish him with some beef at a reasonable price and he says, well, he didn't know, says he thought he might take some and then later on he said, yes, he'd take it — at $25 a head.
>
> "Q. How much a head?
>
> "A. $25.00 a head.
>
> "Q. Was there any understanding as to the size of the beef or anything?
>
> "A. I told him it would dress out around 150 or 200 pounds — at least 150 pounds.
>
> "A. I told him that the beef was about ready for delivery and he said he would take it and I told him, well, we would bring it in the next evening or night and he said he would be ready."

When Stites took the stolen beef to Carnal the latter arranged to have it processed at the Grand Food Market. This was some time between 8:00 and 11:00 o'clock at

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*Each witness is serving a penitentiary sentence for the theft

night, and the dressed beef had dirt on it. Carnal paid Stites the $25.00 in Carnal's restaurant after the delivery. Stites testified concerning his negotiations with Carnal: "When we were speaking of the beef I told him we dealt no questions asked — in regards to where I got them and all that."

Spence, another of the thieves, testified:

"Q. Now when you unloaded the beef at the Grand Food Market would you tell the Jury as to the condition of the beef as to cleanliness?

"A. Well, the beef had been wooled around on the ground getting the hide off of it and it had dirt on it and some leaves and some grass and—well, just roughly it was pretty dirty.

"Q. Now when you were at the Square Deal Cafe to be paid off, did you have any conversation with Mr. Carnal about any troubles?

"A. Well, when we was leaving Mr. Carnal said to me, he says, 'If you boys get into any trouble over this beef, well, I don't know you.'"

No question was raised in the trial that the beef was worth less than $35.00, but on appeal such is raised. It was testified that the selling price of beef was 32 cents a pound at that time. Carnal paid the butcher at the Grand Food Market eight cents per pound for processing 155 pounds of beef. The 155 pounds of beef at 32 cents would calculate $49.60. See *Davis v. State*, 202 Ark. 948, 154 S.W. 2d 112. Giving the evidence in behalf of the State its strongest probative value, as is our rule on ap-

peal in cases like this (*Eddington v. State*, 225 Ark. 929, 286 S.W. 2d 473), there is ample evidence to sustain the jury verdict. It was shown that appellant bought beef in the nighttime, paying $25.00 for it when the market value was $49.60; that he agreed to buy after the seller had told him he was to ask no questions as to the title; and he told the thieves, "If you boys get into any trouble over this beef, well, I don't know you." Certainly, a case was made for the jury.[1]

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[1] In overruling the motion for new trial regarding the sufficiency of the evidence, the Circuit Judge used this language: "Paragraphs 1 through 4 are formal in character and are denied as being without merit for reasons stated herein. It was never disputed that the carcass of beef in question was stolen and the defendant admitted that he purchased it from the thieves. His sole defense was that he did not know that it was stolen property. With the possession admitted and the character of the property undisputed a case was amply made for the jury by the testimony of the state's witnesses together with that of the defendant and his own witnesses, all of whom showed that the deal to purchase the beef and its delivery was accomplished under clandestine circumstances and at a price which labeled the transaction as felonious. Short of a confession the State is never able to prove guilty knowledge except by the plain inferences to be drawn by reasonable men from the facts and circumstances of a given case; and in the instant case the jury interpreted the proof as evidencing guilty knowledge. In fact in this case there was a singular lack of dispute as to what had happened. The principal differences in the proof consisted of the circumstances that the defendant and his girl friend placed the hour of delivery of the beef at from 8:30 to 9:00 P.M.; while the butcher and his helper placed the delivery at around 11:00 P.M. or later, and of course the defendant denied that the beef had been sold to him on a 'no questions asked basis' and further denied that he had told the thieves, in substance, that 'If you boys get into any trouble over this beef, well, I don't know you.' The demeanor and attitude of the defendant and his cohort, Miss Betty McAdoo, while on the witness stand were not calculated to give credence to his assertions, and the court felt that the reaction of the jury as reflected in their verdict, arrived at after due deliberation, was amply justified in the light of all of the facts and circumstances of the case."

II. *Evidence Of Prior Convictions.*

Assignment No. 5 in the motion for new trial reads:

> "The court erred in admitting over the objection and exception of the defendant at the instance of the Prosecuting Attorney the admission of the evidence of prior convictions of the defendant for drunkenness, for driving a car while under the influence of intoxicants and other specific misdemeanors or violations."

In denying the motion for new trial, the Circuit Judge gave a complete answer to this assignment:

> "In Paragraph 5 of the motion for a new trial the point is raised that the court erred in admitting certain evidence over the objection and exceptions of the defendant. In this connection it must be pointed out that the attorneys who are filing this motion for a new trial are not the attorneys who tried the case and if they had been present at the trial they would have observed that there were no objections made or exceptions saved to any actions of the court. The contention of defendant in paragraph 5 of the motion is therefore denied."

III. *Passion And Prejudice.* Assignment No. 6 in the motion for new trial reads:

> "The verdict of the jury was rendered under the influence of passion and prejudice."

There was no evidence offered to sustain this assignment in the motion for new trial. In overruling this assignment, the Circuit Judge said:

> "Paragraph 6 of the motion asserts that the verdict of the jury was rendered under the influence of passion and prejudice. The court knows of no basis whatsoever for this assertion and the motion on this ground is therefore denied."

IV. *Absence Of Corroboration.* Assignment No. 7 in the motion for new trial consists of two paragraphs and reads:

> "There is no substantial admissible or competent evidence in this case. The only evidence on which the verdict could possibly rest would be the evidence of alleged accomplices which is not competent.
>
> "The only substantial evidence in the case tending to connect this defendant with the crime with which he is charged and for which he is convicted was the testimony of the so-called or alleged accomplices and this stands uncorroborated or unsupported by any other substantial evidence, and the verdict under the law in the case cannot be sustained under such circumstances, and on account thereof the verdict should be set aside."

In overruling the motion for new trial, the Circuit Judge stated as regards this assignment:

"Paragraphs 7 and 8 assert that the defendant was convicted on the uncorroborated or unsupported testimony of 'so-called or alleged accomplices'. The court presumes that this has reference to the testimony of the admitted thieves Charles Stites, Ray Spence and Bill Odom. In the first place, even if these persons are to be regarded as accomplices within the meaning of Ark. Stats. Sec. 43-2116, an analysis of all the facts and circumstances before the jury will evidence that the testimony of these three persons was either undisputed in character or corroborated by the defendant himself, other witnesses, or by other facts and circumstances shown in the case. Secondly, it may be questioned whether the thieves were accomplices to the crime on which the defendant was tried. Lastly, and in any event, the defendant is not now in position to question whether or not these witnesses, Stites, Pence and Odom were accomplices or to complain that an instruction was not given under Sec. 43-2116, for he failed at the trial to either claim that they were accomplices or to request the court to give an instruction defining accomplices or the effect to be given their testimony. *Slinkard v. State*, 193 Ark. 765, 103 S.W. 2d 50; *Trotter v. State*, 215 Ark. 121, 219 S.W. 2d 636. The motion in this regard is therefore denied."

As has been previously indicated, present counsel on appeal did not represent the appellant in the Trial Court. We have before us a record with no exceptions to testi-

mony, no objections or exceptions to instructions, and no request for instructions. In *Lackey v. State*, 67 Ark. 416, 55 S.W. 213, this Court, speaking through Mr. Justice Riddick, said:

> ". . . counsel for defendants say that the charge of the circuit judge was defective and incomplete in other respects, and contend that it was the duty of the court to give the whole law of the case to the jury. . . . In this State it has been often held that if a party wishes the trial judge to instruct on any particular point not covered by his charge, he should ask an instruction covering such point. If he sits silent, and makes no effort to remedy the defect, he has no legal ground of complaint."

The judgment is affirmed.

APPENDIX B.

Section 41-3938 of Ark. Revised Stats.:

"Any person who shall possess stolen goods, money or chattels which exceed the aggregate value of $35, knowing them to be stolen, with intent to deprive the true owner thereof, shall be punished by imprisonment in the penitentiary not less than one year nor more than twenty-one years; *and if the aggregate value thereof be not more than* $35.00, *such person shall be guilty of a misdemeanor* and shall be punished by imprisonment in the county prison or municipal or city jail not more than one year and shall be fined not less than ten dollars nor more than three hundred dollars." (Italics ours.)